Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY,

Cross-Petitioner,

v.

RAYMON J. MELTON,

Respondent.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the judgment of the Tenth Circuit Court of Appeals affirming the jury's verdict as to respondent's First Amendment claim pursuant to 42 U.S.C. § 1983 in direct conflict with prior decisional law of this Court and other circuits on this federal question?

2. Was the covert taping of a confidential interview with a federal prosecutor and the turning over of that tape to defense counsel by respondent, a police officer, protected speech on a matter of public concern, or simply conduct not protected under the First Amendment?

3. Assuming *arguendo*, the conduct of Melton as described in Question 2 is speech on a matter of public concern, did the Tenth Circuit err in determining Melton's interest in that speech outweighed The City's interest in the efficient operations of its police department?

4. Did the Tenth Circuit Court of Appeals commit error when it determined as a matter of law the cross-petitioner had the burden of proof to show evidence of actual disruption of intra-departmental activities before the First Amendment balancing test could tip in favor of the governmental entity?

5. Does respondent have a property interest in his status as a retired police officer pursuant to Okla. Stat. tit. 11, § 50-125 (1981)?

QUESTIONS PRESENTED – Continued

6. [Reserved question if this Court grants petition for writ of certiorari] Does respondent have a property interest in continued employment?

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City,[1] a municipal corporation; Lloyd A. Gramling, Chief of Police for The City of Oklahoma City; Gerald L. Emmett,[2] Assistant Chief of Police for The City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith,[3] Lieutenant, Oklahoma City Police Department; David McBride,[4] Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to The City Manager, Defendant.

Oklahoma Municipal League, Inc. *amicus curiae*, on brief to the Tenth Circuit en banc (no subsidiaries or parent companies known)

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[1] The City of Oklahoma City is a municipal corporation with no parent companies or subsidiaries to list pursuant to Rule 29.1. This petition for writ of certiorari pertains to judgment rendered against it. Except as noted herein, the remaining defendants have filed separate cross-petitions.

[2] Deceased.

[3] Carl Smith received a defendant's verdict which was affirmed. The opinion rendered in favor of Melton in Appendix of petitioner, pp. 53-136, is not the subject of error by Melton in his petition.

[4] The plaintiff's judgment against David McBride was reversed by the Tenth Circuit in the opinion reported in *Melton I*, petitioner's Appendix at 53, and is not the subject of error by Melton in his petition. McBride received a defendant's verdict on the First Amendment and Property Interest Due Process claims.

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v.

RAYMON J. MELTON,

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Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioner, The City of Oklahoma City, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Tenth Circuit entered in this proceeding March 19, 1991, as authorized by Rules 12.3, 13.4 and 13.5 of the Supreme Court Rules, 1990 revisions.

OPINIONS BELOW

On June 21, 1989, the Court of Appeals for the Tenth Circuit rendered its opinion on the consolidated appeals and cross-appeal from the United States District Court in the Western District of Oklahoma, which affirmed in part

and reversed in part the judgment of the district court on a jury verdict. The cross-petitioners filed separate petitions for rehearing with suggestion for en banc consideration. The June 21st opinion is reported at 879 F.2d 706 and is included in the Petitioner's Appendix at 53-136.

On November 3, 1989, the panel members of the Tenth Circuit Court denied the petitions, but a majority of the Court's active judges agreed to rehear the cases on four issues reported at 888 F.2d 724, and attached to the Petitioner's Appendix at 50-52. On March 19, 1991, an opinion en banc was filed and reported at 928 F.2d 920, and included in Petitioner's Appendix at 1-49. Judgment was entered the same day which vacated the portion of the judgment of the district court in favor of Melton and remanded the matter to the district court to conduct other proceedings in accordance with the Tenth Circuit's opinion of June 21, 1989.

JURISDICTION

On June 13, 1991, respondent filed a motion for extension of time to file, a petition for writ of certiorari, from the judgment of the Court of Appeals for the Tenth Circuit en banc filed March 19, 1991. This was pursuant to Rule 13.5 of the Rules of the Supreme Court. This Court granted an extension until July 2, 1991, and at that time a petition for writ of certiorari was filed. The petition was received by The City of Oklahoma City on July 5, 1991.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c) and Rule 12.3 of the Rules of the Supreme Court, and the cross-petition is filed

within thirty days of the receipt of the petition for writ of certiorari.[5]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States provides:

> **AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[5] This cross-petitioner has objected to the jurisdiction of the court to review a petition for writ of certiorari as required by Rules 13.4 and 15 of the Rules of the Supreme Court.

3. **42 U.S.C. § 1983 provides:**

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. **Okla. Stat. tit. 11, § 50-125 (West Supp. 1991) provides:**

> **§ 50-125. Retired officers – Retention of status as peace officers – Emergencies**
>
> Members retired under the provisions of this article may retain their status as peace officers of the State of Oklahoma, retired, and as such may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement. Such retired members may in times of great emergency or danger serve in keeping with their availability and ability at the request of the Governor of Oklahoma or the mayor of their retirement municipality.

5. **Okla. Stat. tit. 11, § 13-108 (West 1978) provides:**

> **§ 13-108. Deposit of copies for record – Judicial notice**
>
> After the approval of the charter by the Governor, duplicate copies shall be made

> and one shall be deposited in the office of the Secretary of State, and the other, after being recorded in the office of the county clerk of the county in which the situs of the municipality is located, shall be deposited in the archives of the municipality. Thereafter the charter shall be judicially noticed in all court proceedings.

STATEMENT OF THE CASE

Plaintiff/Cross-Appellee/Petitioner/Respondent, Melton, will hereinafter be referred to by name or Respondent; Defendant, The City of Oklahoma City, and other party Defendants/Appellants/Cross-Petitioners will be referred to as "The City" or names of Defendants, respectively, or Cross-Petitioners, collectively.

A. Factual Background

Lt. Melton, a detective for The Oklahoma City Police Department, was a friend of William C. Page, a state district court judge in Oklahoma County, Oklahoma. Judge Page was being investigated and prosecuted by the United States Attorney for the Western District of Oklahoma on charges of racketeering charges as a public official.

Prior to Page's trial, Melton went to the federal courthouse for an interview about Judge Page with The Assistant United States Attorney handling the case. This interview took place while Melton was acting in the course of his duties as a police officer.

While this confidential interview was being conducted by a federal prosecutor, Melton was surreptitiously taping the conversation. Plaintiff later turned this taped interview over to defense counsel for Judge Page and also discussed the contents of the confidential interview with said counsel. Melton later testified for the defense in the criminal prosecution of Judge Page. Although Melton testified that he believed this taped conversation included *Brady* or exculpatory material, the trial court in the criminal action determined that it did not. The district court judge in the civil case instructed the jury that it was *Brady* material. The federal district judge denied Mr. Page's motion to dismiss the criminal charges based upon the failure of the government to provide exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963).[6]

Federal Bureau of Investigation Special Agent Ron West lodged a complaint with The City's Police Chief, Lloyd A. Gramling.

As a result of this FBI complaint, Lt. Carl Smith of the police department conducted an internal affairs investigation of Melton at the request of Chief Gramling.

Lieutenant Smith then provided Melton with a written notice informing Melton that an investigation of the FBI charges was being conducted. Melton was specifically accused of violating § 1.01 of The Oklahoma City Police

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[6] Page was convicted of racketeering and extortion on July 29, 1983. *United States v. Page*, No. CR-83-73-R (W.D. Okla. filed April 6, 1983), *aff'd*, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987).

Code of Ethics by revealing details of a confidential conversation with an Assistant United States Attorney to defense counsel for Page and by making perjured statements in an affidavit and during his testimony given in the criminal trial. On September 8, 1983, Gerald L. Emmett, Assistant Chief of Police, gave notice to Melton that the Review Board would convene on September 13, 1983, as a result of the internal affairs investigation.

The Departmental Review Board convened on the scheduled date and Melton was advised by Chairman Emmett's opening remarks that the allegations of federal perjury were dropped and the Board would only deal with the alleged breach of the Code of Ethics.

The pertinent portion of § 1.01 provides:

> I will be exemplary in obeying the laws of the land and the regulations of my Department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

Lt. Melton appeared before the Board and freely admitted to the members that he had secretly taped his interview with the federal prosecutor and turned the recorded tape over to Page's legal counsel.

The Board members voted six to one to sustain the charge that Melton had committed a serious violation of the Code of Ethics by his conduct in secretly taping a confidential interview with an Assistant U.S. Attorney and by turning this tape over to the criminal defense counsel. There was never any consideration by the Board that The Code of Ethics was violated by virtue of Melton's appearance as a witness at the criminal trial.

The findings of the Board were submitted to Police Chief Gramling, who subsequently terminated Melton by letter written September 13, 1983, after the disciplinary dismissal was approved by The City Manager. Subsequent to his termination, Melton was granted retirement pension benefits under the State Police Pension System due to the length of his service with the police department without objection of The City.

Chief Gramling, by letter written to respondent after his dismissal, advised Melton that due to the unmeritorious retirement, he did not "retain the privilege or approval to bear firearms or otherwise represent yourself as a commissioned officer of The Oklahoma City Police Department, as provided by State Law 11 O.S. 50-125".

With respect to other factual background information surrounding this case, cross-petitioner would adopt the statement of facts contained in its brief in opposition to a petition for writ of certiorari and the statement of the case of the other cross-petitioners.

B. Proceedings Below

Plaintiff sued The City of Oklahoma City, the police chief, and seven employees of The City under 42 U.S.C. §§ 1983, 1985 and 1988, and 18 U.S.C. §§ 1961-68 alleging he was wrongfully terminated as a police officer and was deprived of his liberty and property rights without due process of law and engaging in a criminal conspiracy, and that his discharge was a retaliation for the exercise of his First Amendment Rights.

On February 4, 1985, a jury verdict was rendered against some of the defendants in a total amount of $1,272,000 in actual damages and a total of $28,200 in punitive damages. The trial court directed a verdict as to all cross-petitioners on Melton's RICO claim. A verdict on the § 1985(2) claims was rendered in favor of all the defendants. Carl Smith received a defendant's verdict. Additionally, David McBride received a defendant's verdict on the First Amendment claim and the Due Process claim – property interest. The punitive damages were stricken when the trial court partially granted cross-petitioners' J.N.O.V. Motion.

The cross-petitioners filed a motion for new trial which was denied. The City of Oklahoma City and the individual cross-petitioners appealed the judgment of the trial court for the Western District of Oklahoma, including the denial of attorney fees to Smith. The appeals were consolidated. Melton cross-appealed on the issues of the cross-petitioners' verdict on the RICO charges and the J.N.O.V. striking punitive damages.

On June 21, 1989, the panel of the Tenth Circuit Court of Appeals rendered an opinion on this consolidated appeal. In its opinion, the Court:

(1) Reversed the jury verdict on the First Amendment claim and remanded for a new trial as to the individual cross-petitioners on the issue of whether Lt. Melton's trial testimony was a substantial motivating factor in his discharge (As to The City, the Court affirmed the jury verdict of $50,000.);

(2) With respect to cross-petitioners' liability on Lt. Melton's deprivation of property claims on continued employment, ordered the trial court to direct a verdict for the

individual defendants. (In this case, the appellate court appeared to direct judgment for respondent and against Gramling solely on the retirement status property interest claim. Additionally, the matter was remanded to the trial court to determine if The City had ratified Gramling's acts and/or whether or not Gramling was acting in his official capacity.);

(3) With respect to the liberty interest claims, reversed the verdict against McBride;

(4) Affirmed the judgment on the cross-appeals;

(5) Affirmed the J.N.O.V. as to the punitive damage issue;

(6) Affirmed the denial of Smith's request for attorneys' fees.

On March 19, 1991, the opinion on the rehearing en banc and judgment were rendered the same day. The en banc court:

(1) Affirmed the judgment of the district court in part and reversed in part;

(2) Vacated all the judgments as to the liberty interest claims against the remaining cross-petitioners, including The City, and remanded to the district court with orders to enter judgment for these cross-petitioners on this claim;

(3) Further ordered the trial court to conduct other proceedings in accordance with the Tenth Circuit's opinion of June 21, 1989.

The jurisdictional statement details the proceedings occurring since the judgment of March 19, 1991, was entered.

REASONS FOR GRANTING THE WRIT

I.

THE TENTH CIRCUIT COURT OF APPEALS RENDERED A DECISION ON A FEDERAL QUESTION ON THE FIRST AMENDMENT AND PUBLIC EMPLOYEE SPEECH WHICH WAS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Melton's conduct in covertly taping a confidential interview with a federal prosecutor is not protected speech and such a finding by the Tenth Circuit conflicts with prior decisional law of this Court. In the first opinion, the Tenth Circuit Court of Appeals reviewed Instruction No. 5, the trial court's instruction as to Melton's allegations he was discharged on the basis that he exercised his First Amendment rights and held it improperly combined two bases of liability and did not include the proper burden of proof allocation. The court held these errors to be harmless as to Defendant City. Petitioner's Appendix at 112-13. The two bases for liability were:

(1) Lt. Melton's trial testimony in the Page criminal trial;

(2) Melton's actions in connection with the covert tape recording of the prosecutor's conversation.

The Tenth Circuit also noted the trial court erred in submitting the First Amendment issue to the jury as to whether or not Plaintiff's conduct was constitutionally protected, as the inquiry into the "protected status of speech is one of law, not fact". *Id.* at 113. *See Connick v. Myers*, 461 U.S. 138, 148 (1983).

The appellate court further noted that although the defendants contended throughout the trial proceedings

that no evidence was introduced to show Melton was terminated for his trial testimony, the matter would be remanded to the trial court in a jury trial to determine if the criminal trial testimony was the motivating factor in plaintiff's discharge in accordance with *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), as to the individual defendants. Petitioner's Appendix at 114. The Tenth Circuit further determined the individual defendants were entitled to a qualified immunity defense on Melton's conduct as to the tape recording under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Petitioner's Appendix at 114.

Since The City, a municipal corporation, was not entitled to qualified immunity, the Court affirmed the verdict of the trial court stating that The City would be liable under either ground since both grounds were protected speech. Petitioner's Appendix at 72.

In affirming the judgment against this cross-petitioner on the First Amendment claim, the Tenth Circuit conducted a multi-step inquiry. First, the Court applied the *Connick* test and determined Melton's conduct was a matter of public concern. The second prong of the inquiry was to conduct a "balancing test" of the interests of a public employee versus the interests of the governmental employer "in the effective and efficient fulfillment of its responsibilities to the public", Petitioner's Appendix at 62-68, citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

If the first two prongs weigh in favor of plaintiff, plaintiff bears the burden to prove the protected speech was the motivating factor in his termination. Petitioner's Appendix at 69, citing *Mt. Healthy*, 429 U.S. at 287. If the

plaintiff has met this then in the fourth prong of the test, the burden of proof is shifted to the public employer to prove the protected speech was not the motivating factor. The Tenth Circuit in *Melton* further noted the first two prongs of the inquiry were questions of law for the Court while the last two steps were questions of fact for a jury.

The Tenth Circuit applied this inquiry to both of Melton's allegations of protected speech and held both were protected. However, the Court held on the individuals' claim of qualified immunity that the taping was not a "clearly established" right.

The majority opinion concluded that respondent's disclosure of a private conversation with an Assistant United States Attorney to the counsel for Judge Page in the criminal proceeding was a matter of public concern and the balancing test weighed in favor of Melton.

The City contends that Melton's criminal trial testimony was the motivating factor in his termination and no evidence was submitted at trial which contradicts that contention. The City does not contest that testimony in a criminal trial is protected speech even for public employees, and this issue is not grounds for requesting a cross-petition for writ of certiorari.

Cross-petitioner does contend, however, that there are grounds for this Court to exercise its supervisory jurisdiction and grant this cross-petition based on a misapplication of the controlling United States Supreme Court decisions.

Specifically, the Tenth Circuit Court of Appeals did not properly analyze Melton's speech when it determined the conduct of plaintiff in taping a conversation with a

prosecutor while on duty as a police officer and turning over this recorded conversation to a criminal defense attorney was a matter of a public concern. The Tenth Circuit by dicta admitted that Melton's actions were for personal reasons.

> Melton, however, recorded the interview for a purely private purpose. As a friend of Page, Melton believed he (Melton) was under surveillance and did not want to risk being misquoted. (Record citations omitted. Judge Baldock concurred in part as to the First Amendment issue.)

Petitioner's Appendix at 121.

> In preparation for the trial of Mr. Page, the federal prosecutor interviewed Mr. Melton. For reasons of his own, Mr. Melton surreptitiously recorded his conversation with the prosecutor and later gave the recording to counsel for Mr. Page.

Petitioner's Appendix at 3.

Further, even if such conduct were a matter of public concern, the Tenth Circuit erred when it held the *Connick/Pickering* balancing test tipped in favor of Melton, a police detective who violated the police department's Code of Ethics, § 1.01, by divulging confidential matters which were secretly taped while in his course of duties as a police officer.

Historically, there was a right/privilege dichotomy which provided that a public employer could completely restrict an employee's free speech rights as a condition of employment since public employment was a privilege. First Amendment freedom of speech protection was subsequently afforded to citizens of the states by the

incorporation of the Due Process Clause of the Fourteenth Amendment. This view was expressed by Justice Holmes in *McAuliffe v. Mayor of City of New Bedford* when he announced: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892) and cited in dissent in *Rankin v. McPherson*, 483 U.S. 378, 395 (1987). In *McAuliffe*, a policeman was removed from office by the Mayor after it was determined the policeman had violated a regulation which provided: "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever." *Id.* at 517. The allegation was that the police officer was not entitled to express his political opinions. Justice Holmes further noted in *McAuliffe*: "On the same principle, the city may impose any reasonable condition upon holding offices within its control." *Id.* at 518.

The cases upholding this right/privilege distinction were later limited as to the scope of conditions which could be placed on public employees. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). However, conditions on public employment have been upheld on the basis of the strong governmental interests involved. *Brown v. Glines*, 444 U.S. 348 (1980) (military personnel must yield to certain demands of discipline and duty); *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding a police department regulation governing hair grooming for police officers in a desire for an esprit de corps); *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding Hatch Act and similar state versions). In the case at bar, Melton was not discharged for the content contained in the secretly

recorded tape; he was discharged for secretly recording and turning over the tape. The ethical restrictions imposed on Melton's conduct were designed to facilitate cooperation and trust between police and other law enforcement personnel, such as prosecutors. Confidentiality is of paramount importance, and the various branches of law enforcement must be able to expect such discretion from each other in furtherance of their common goals. It was not what was said on Melton's tape that concerned The City, but rather the fact that he acted in a way which destroyed the necessary expectation of confidentiality.

In *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984), the United States Court of Appeals for the Fourth Circuit upheld the demotion of a police department employee who clandestinely took a copy of the department's Emergency Operations Center Internal Inspection Report to Bob Woodward of the *Washington Post* after Woodward had continued to inquire about the report on a number of occasions. Noting that "the free speech rights of an employee in a police department are more limited than of a teacher," *id.* at 880, the Court found Jurgensen's conduct in releasing the confidential materials, in violation of a departmental regulation governing his employment, was insubordination and his discharge was not a violation of Jurgensen's First Amendment rights. *Id.* at 887. In the present case, Melton's conduct was also in direct violation of a valid departmental regulation which governs conduct, not the content of speech.

The seminal case on the issue of the right of a governmental employer to place restrictions on a public employee's First Amendment freedom of speech is *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*,

a public school teacher wrote a letter to the editor with criticisms against the school board and superintendent for their handling of a recent school tax election. In reversing the ruling of the Supreme Court of Illinois which had affirmed the teacher's dismissal, the United States Supreme Court stated:

> [T]he State has interests as an employer in regulating speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id at 568.

Subsequent cases expounded on this *Pickering* balancing test which was to be the touchstone to determine if a public employee's speech or activity qualified for constitutional protection. The burden of proof of the parties was established in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In this case, Doyle, a public teacher, was not rehired after several incidents, including making obscene gestures to students when they failed to follow command in a cafeteria and after he conveyed by telephone conversation the substance of a memorandum concerning a dress code of the school to a local radio station. The Court upheld the finding of the district court that the telephone communication was protected speech but could not determine if this communication was the substantial cause of his termination.

The Court found:

> There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments.

Id. at 284.

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' – or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Id. at 287.

The parameters of what is a matter of "public concern" was announced by this Court in *Connick v. Myers*, 461 U.S. 138 (1983). Myers, an Assistant District Attorney, was told she would be transferred to a different division of criminal court and she strongly opposed this transfer. She expressed her displeasure by circulating a questionnaire soliciting views of her fellow peers on many matters, including issues dealing with grievances, office transfer policy and political campaigns. The District Attorney discharged her because of her refusal to transfer and her distribution of the questionnaire which he determined was an act of insubordination. Myers instituted a

civil rights action pursuant to 42 U.S.C. Section 1983. The district court held that the questionnaire involved matters of public concern and was, therefore, protected speech. Additionally, the trial court determined that the District Attorney, the governmental entity, had not clearly demonstrated the questionnaire had substantially interfered with the operations of the office. The Court of Appeals affirmed.

On certiorari, this Court reversed the decision of the Court of Appeals for the Fifth Circuit and held the discharge of the Assistant District Attorney did not offend the First Amendment. The Supreme Court determined the district court erred by misapplying the *Pickering* test and "striking the balance" for Myers, the public employee. *Id.* at 142.

> The repeated emphasis in Pickering on the right of a public employee "as a citizen in commenting upon matters of public concern," was not accidental. This language, reiterated in all of Pickering's progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

Id. at 143 (footnote omitted).

> Pickering, its antecedents and its progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of

> the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Id. at 146 (citations omitted).

The Supreme Court in *Connick* held the determination of whether a public employee's speech is a matter of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record". *Id.* at 147-48. Furthermore, the Supreme Court has final authority to make determinations as a matter of law and to examine the issues and statements or conduct in its determination. Since one of the questions dealt with political campaigns, this Court conducted a balancing test. Although there was no demonstration that Myers' questionnaire interfered with her ability to perform her duties, the Court did not require the employer to actually prove disruption of the office or destruction of working relationships before taking employment disciplinary action. The Supreme Court struck the balance in favor of the government when it determined the survey was characterized as an employee grievance. "The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.

The Supreme Court applied the *Pickering/Connick* test in determining whether a public employee's private comment made in response to an attempted assassination of President Reagan, was protected speech. *Rankin v.*

McPherson,483 U.S. 378, 381 (1987). In that case, McPherson had made the remark "[S]hoot, if they go for him again, I hope they get him." in private to a coworker and was overheard and reported by another coworker. The Court, in balancing the interests of the employee and the state's interest in the efficient functioning of the workplace, held McPherson's role as a data entry clerk for a constable's office did not warrant a balance in favor of the governmental employer. Although there was argument that McPherson worked in law enforcement, the Court determined she was not a peace officer and that the basic function of the constable's office was service of process. In essence, the Supreme Court determined there was no serious potential for office disruption.

Cross-petitioner contends the Court of Appeals for the Tenth Circuit properly determined it could, as a matter of law, conduct a First Amendment inquiry although the trial court had instructed the jury to make certain First Amendment determinations. However, as in *Connick*, the Tenth Circuit erred by misapplying the *Pickering/Connick* test when it determined Melton's conduct was protected by the First Amendment as being a matter of public concern and tipped the balancing inquiry in favor of the public employee, a police officer charged with law enforcement functions. The fatal error of the Tenth Circuit was the finding:

> Although we recognize the *potential* impact that a breach of confidentiality may have on the department, we must point out that the government *must introduce evidence of an actual disruption* of its services resulting from the speech at issue. *See Rankin*, 107 S.Ct. at 2899; *Pickering*, 391 U.S. at 570-71. While the confidentiality claim may, under other circumstances, tip the balance

> in favor of the government, here the City failed to make its case.

Petitioner's Appendix at 67. (some emphasis added). (footnote omitted)

> Moreover, we are unpersuaded that the City's fundamental assumption – that any communication between law enforcement officials is by its very nature confidential – is correct . . . . We view the communication between Mr. Melton and the prosecutor . . . as one arising *outside* the scope of departmental confidentiality.

Id. at 67-68 (emphasis in original).

The majority in the *Melton* panel held "Mr. Melton's interest in this speech outweighs the City's interest in *intradepartmental* relations". *Id.* at 68 (emphasis in original). They noted the dissent's assertions that the court was creating a new burden for the public employer to introduce evidence of actual disruption.

Cross-petitioner contends Melton's speech was not a matter of public concern. Alternatively, if it was a matter of public concern, the potential for disruption both in the police department and in dealings with other law enforcement entities, including state and federal prosecutors, is great if this holding is affirmed. Police officers have been treated by the courts as being para-military and the nature of the business justifies an evaluation of the special character of the organization and an absolute need for secrecy in the officer's communications with a prosecutor. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (1984).

There is an immediate need for this Honorable Court to grant cross-petitioner's petition for writ of certiorari due to this misapplication of a Supreme Court decision

which will impair confidential relationships of law enforcement agencies with a broad sweep. The decision of the Tenth Circuit was as a matter of law clearly erroneous and should be reversed with judgment entered for The City. As testified by Constable Rankin and noted in the dissent, such a ruling, if upheld, would allow Melton to "ride with the cops and cheer for the robbers." *Rankin v. McPherson*, 483 U.S. at 394.

II.

THE TENTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION ON BURDEN OF PROOF IN FIRST AMENDMENT PUBLIC EMPLOYEE SPEECH WHICH WAS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Tenth Circuit Court of Appeals in *Melton* imposed a new burden on a public employer of introducing evidence of actual disruption of the office activities before determining a public employer's interest was greater than the public employee in conducting the *Connick/Pickering* balancing test.

In footnote 11 of the *Melton* panel opinion, the Court acknowledged the conflict of this burden requirement with other circuits. *Melton*, Petitioner's Appendix at 67, citing *Matherne v. Wilson*, 851 F.2d 752, 761 n. 53 (5th Cir. 1988); and *Jurgensen v. Fairfax County*, 745 F.2d 868, 879 (4th Cir. 1984), which allow a reasonable belief that disruption will occur as satisfying this requirement in some circumstances.

Therefore, since the Tenth Circuit Court of Appeals has decided this federal question which is in direct conflict with other circuits, this Court should grant certiorari to this cross-petitioner.

III.

TENTH CIRCUIT'S DECISION IN DETERMINING MELTON HAD A SEPARATE PROPERTY INTEREST AS A RETIRED POLICE OFFICER PURSUANT TO OKLA. STAT. TIT. 11, § 50-125 WAS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

The trial court submitted Instruction No. 6 entitled Due Process-Property Interest to the jury to determine if Melton had been denied procedural due process in his continued employment as a police officer. (Cross-Petitioners' Appendix at 6-7) The prefatory statements contained in this instruction stated, in part:

> You are further instructed that, under the laws of the State of Oklahoma, retired police officers *may retain* their status as peace officers of the State of Oklahoma, retired. An officer who retains such status may retain the right to keep and bear firearms *when approved* by the officials of the municipality of retirement.

Id. at 6 (emphasis added).

A jury verdict was rendered against The City of Oklahoma City on this property interest claim in the amount of $140,000. The City appealed the verdict as to any determination of a property interest of Melton in employment, and in summary the following issues were addressed:

(1) The City Charter and Oklahoma law refutes the existence of plaintiff's interest in continued employment and the trial court erred in the instructions on this issue;

(2) Alternatively, the procedures provided by The City of Oklahoma City satisfied procedural due process.

The majority opinion in *Melton I* held plaintiff had two separate property interests: (1) As a lieutenant in the Oklahoma City Police Department; (2) as a retired police officer.

The Tenth Circuit noted, however, the due process instruction resulted in a general verdict on the combined procedural due process issues. The panel ruled the trial court had committed error in not directing a verdict for defendants on the continued employment issue "because the undisputed facts concerning notice and hearing clearly indicate that adequate process was given". Petitioner's Appendix at 76.

Although the trial court used a general verdict form, the majority further held:

> Normally, we should remand for a new trial on the issue whether Mr. Melton was deprived of his property interest in retirement status without due process of law. We find it unnecessary to remand on this issue, however, because we find that the evidence developed in the record establishes as a matter of law that Mr. Melton received no process before he was deprived of his property interest in his status as a retired police officer. Oklahoma law authorizes retired police officers to retain their status as "peace officers". Okla. Stat. tit. 11, § 50-125 (West 1978). Additionally, the City's Police Department Operations Manual permits retiring officers with twenty years of service to retain their police badges. Operations Manual § 5.05. These provisions clearly created a property interest in Mr. Melton with respect to his status as a retired officer and in the benefits which accrue therefrom.

Id. at 77.

> In sum, with respect to defendants' liability on Mr. Melton's deprivation of property claims, the trial court shall direct a verdict for defendants on the continued employment claim and direct a verdict for plaintiff on the retirement status claim. However, plaintiff's verdict shall be entered *solely against Chief Gramling*. We remand for a new trial on two issues: (1) the damages to be assessed against Chief Gramling, and (2) the liability of the City for Chief Gramling's actions. The trial court must determine as a matter of law if Chief Gramling acted as a "final policymaker" or if his actions were ratified by a "final policymaker" before it submits the question of damages against the City to the jury. See *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), *and* discussion *infra*.

Id. at 78-79 (some emphasis supplied).

In footnote 18, the majority further stated that The City did not challenge the trial court's finding of Melton's property right as a retired police officer and, therefore, they did not review this finding. Petitioner's Appendix at 76. Further, in footnote 19, the majority stated: "The trial court not only erred in combining the two deprivation of property issues under one jury instruction but also erred by failing to limit its application to Chief Gramling and the City in the retirement status determination." *Id.* at 78.

As to the other individual cross-petitioners, the property interest claim was dismissed by the Tenth Circuit.

Although Instruction No. 3 included a contention of the plaintiff that he had a property interest in his retirement status, a separate jury instruction regarding retirement status was never given. The City contends the general verdict on due process property interest claim

allowed recovery for an alleged deprivation of a protected property interest in continued employment only. Instruction No. 6, however, was so confusing the jury could have awarded Melton damages on either continued employment or retirement status.

The assertion by the Tenth Circuit that Oklahoma law "authorizes" a police officer to retain the status of peace officer refers to Okla. Stat. tit. 11, § 50-125. Section 50-125 states that a retired police officer "may retain" the status of peace officer. Although there is no Oklahoma case specifically addressing the use of "may" as it appears in Okla. Stat. tit. 11 § 50-125, there is case law interpreting other statutory use of the term "may" which establishes that the use of "may" expresses a discretionary not mandatory legislative intent.

The Tenth Circuit did not examine § 50-125 in light of the intent of the legislature to create a right or to allow a privilege. It simply glossed over the presumption of discretion implicit in the use of "may" by ignoring the language selected by the Oklahoma legislature.

> This Court will not discuss the myriad number of cases . . . discussing the semantic connotation placed on the use of the words "shall" and "may", other than to state that the word "shall" is generally construed as being mandatory or directive and the word "may" as permissive or discretionary.

Mason v. National Flood Insurers Association, 431 F. Supp. 1021, 1022-23 (N.D. Okla. 1977).

Nevertheless, such a provision could not under any interpretation confer a property right to Melton on his retirement status. Therefore, the Due Process Clause of

the Fourteenth Amendment of the U. S. Constitution cannot be invoked as there is no property right.

In order to have a constitutionally protected property interest, one must be able to demonstrate a legitimate claim of entitlement to the interest. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

Thus, whether Melton had a property interest in his government employment or retirement depends upon whether one was created under Oklahoma law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

The majority in *Melton* took judicial notice of The City as a Charter city for purposes of determining "that the City Manager is the 'final policymaking authority' over employment decisions affecting City personnel" and determining a municipal liability under *Praprotnik* analysis.[7] Petitioner's Appendix at 90 citing, *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). *See also: Graham v. The*

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[7] Footnote 34 recited pertinent portions of The City Charter which provided for dismissal "solely for the good of the service". Petitioner's Appendix at 99. The Tenth Circuit did not take judicial notice of the Charter for its determination as to whether Melton had a property interest in continued employment.

City of Oklahoma City, 859 F.2d 142, 146 (10th Cir. 1988); (police officer for Oklahoma City has no property interest in employment).

Judge Baldock in his dissent stated:

> Contrary to the court's dubious construction, the plain language of § 50-125 indicates that whether retired officers "may retain" their status as peace officers and their right to possess firearms is entirely within the discretion of their superiors. Additionally, neither the court nor Melton point to any rule or regulation which entitles him to wear his police uniform in security-type employment. Consequently, under Oklahoma law, Melton has no legitimate claim of entitlement to, and *a fortiori* no property interest in, any status as a retired police officer.

Petitioner's Appendix at 130-31.

Neither the Charter nor any statute or policy contains any language which would entitle Melton to a property interest in his retirement status. Since Melton had no property interest in his retirement status, no constitutional due process hearing would be required. It was "plain error" for the Tenth Circuit to sever Instruction No. 6, and cross-petitioner requests this Honorable Court to grant certiorari, reverse the decision of the appellate court which remanded the matter to the trial court to determine damages as to Gramling and municipal liability. *Zant v. Stephens*, 462 U.S. 862, 881 (1983). Furthermore, the decision of the Tenth Circuit finding a property interest in retirement status was in direct conflict with *Board of Regents v. Roth* and *Bishop v. Wood*. (Although there is no present finding of municipal liability on this issue, cross-petitioner raises this matter as grounds for certiorari to preserve this issue.)

IV.

THE TENTH CIRCUIT'S FINDING THAT MELTON HAD A PROPERTY INTEREST IN CONTINUED EMPLOYMENT WAS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Although the Tenth Circuit ruled in favor of The City on the issue of whether The City had satisfied the procedural due process requirements of the Fourteenth Amendment in its termination of Melton, The City wishes to reserve this issue in the event respondent's petition for certiorari is granted. In this regard, The City incorporates the arguments contained in Proposition III.[8]

CONCLUSION

Defendant City of Oklahoma City prays this Court, upon consideration of the argument above, to grant it certiorari for review of the important issues raised herein.

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[8] *See also* Okla. Stat. tit. 11, § 13-108 (West 1978). (Statute which authorizes courts to judicially notice charters).

91-281

No. 91-29

Supreme Court, U.S.
FILED
AUG 5 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY, et al.,

Cross-Petitioners.

v.

RAYMON J. MELTON,

Respondent.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX TO CROSS-PETITIONS FOR CERTIORARI

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RAYMON J. MELTON, Plaintiff-Appellee, Cross-Appellant, v. CITY OF OKLAHOMA CITY; LLOYD A. GRAMLING; GERALD L. EMMETT; MARVIN MAXWELL; WILLIAM R. CHAMBLESS; CARL SMITH; ROBERT TAYLOR; DAVID MCBRIDE; PAULA HEARN; JOHN DOE; RICHARD ROE, and Other Unidentified Individuals, Defendants-Appellants, Cross-Appellees.	)	Nos. 85-1738 85-1739 85-1740 85-1741 85-1742 85-1811 (D.C. No. CIV-84-65-E) FILED APR 15 1991

JUDGMENT
Entered March 19, 1991

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This cause was submitted to a panel of the court on the record on appeal from the United States District Court for the Western District of Oklahoma, was argued by counsel, and decided by opinion filed June 21, 1989. The cause was subsequently reheard en banc and an opinion on rehearing en banc was filed March 19, 1991.

Upon consideration whereof, it is ordered that the judgment of the district court is affirmed in part and reversed in part. Further, that portion of the judgment of the district court entered in favor of plaintiff on his liberty interest claim is vacated. The cause is remanded, and the district court is instructed to enter judgment for the defendants on the plaintiff's liberty interest claim and to conduct other proceedings in accordance with the court's opinion filed June 21, 1989.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

INSTRUCTION NO. 5

FIRST AMENDMENT CLAIM

Plaintiff contends that his First Amendment right to freedom of speech was violated as follows:

1. He was discharged from his employment as a police officer with the Oklahoma City Police Department for making a tape recording of his conversation with the federal prosecutor and for giving the tape recording to the attorney for a person accused of a crime; and,

2. He was discharged from his employment as a police officer for appearing as a defense witness at the accused person's trial in federal court.

In order to prevail upon his civil rights claim against the defendants for a violation of his First Amendment right to freedom of speech, plaintiff must establish the following elements by a preponderance of the evidence:

FIRST: That his actions in connection with the tape recording and/or in appearing as a witness in a federal proceeding were constitutionally protected; and,

SECOND: That the exercise of his constitutional right to freedom of speech was a motivating factor in the defendant City's decision to terminate his employment.

It is the duty and responsibility of every citizen to participate in the due administration of justice. If a citizen has information which be believes will help ensure that justice is done, then he should voluntarily, and without reservation, make that information available.

Whether he gives it to the prosecution or to the defense makes no difference.

With regard to the tape recording plaintiff made of his conversation with the federal prosecutor, you are instructed that when one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he heard. It is but a logical and reasonable extension of this principle that a man takes the risk that his hearer, who is free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. Thus, the covert recording of a conversation such as the one involved herein is not improper either from a legal or ethical standpoint.

The Oklahoma City Police Code of Ethics provides: "Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty." You are told that as a matter of law the conversation between the plaintiff and Prosecutor Fredenberg contained "Brady" information that the prosecutor was obligated under court order to turn over to defense counsel in the Page case.

Thus, the question of whether or not it was proper to let Judge Page's lawyers have the recorded conversation depends upon your determination of whether the information was confidential in nature or was confided to him in his official capacity. If you so find, then it was improper for plaintiff to give same to Judge Page's lawyers, and plaintiff could legally be fired for failure to

keep it secret, unless revelation of such information was necessary in the performance of his duties.

On the other hand, if you find that the information was neither confidential in nature nor confided to him in his official capacity, or that revelation of the information was necessary in the performance of his duties, then the plaintiff could not be fired for failing to keep it secret.

If the Jury finds that the defendants or any one of them or any combination of them violated the plaintiff's First Amendment rights in this case by discharging him, then and in that event you must find in his favor even though you further find that he was afforded all of his rights under the "due process laws" because even the fullest hearing and the most complete opportunity to confront his accusers and to cross examine and produce witnesses to refute charges cannot operate to exonerate defendants from violation of plaintiff's First Amendment rights.

INSTRUCTION NO. 6

DUE PROCESS CLAIM – PROPERTY INTEREST

The "privileges and immunities" protected by Section 1983 of Title 42 of the United States Code include those secured by the due process clause of the Fourteenth Amendment to the Constitution.

You are instructed that the provisions for termination, as set forth in the Oklahoma City Police Department Manual and in the Policy and Procedures Manual for the City of Oklahoma City, are sufficient to give the plaintiff a legitimate expectation that his employment would continue absent cause for discharge. Hence, a property interest in his continued employment was created which must be afforded constitutionally guaranteed due process.

You are further instructed that, under the laws of the State of Oklahoma, retired police officers may retain their status as peace officers of the State of Oklahoma, retired. An officer who retains such status may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement.

You are also told that the City of Oklahoma City has an important interest in the efficient functioning of the city machinery which may be impeded by imposing a requirement of adversarial, trial-like hearings for every discharged employee. Therefore, as a general rule, a discharged City employee is not entitled to have an attorney present at a grievance hearing, to be present when others testify against him, or to cross-examine witnesses.

Accordingly, you are instructed that before a person is deprived of a protected property interest in his continued employment with the City of Oklahoma City, due process requires at a minimum that:

(1) He must be afforded an opportunity for a hearing before an impartial tribunal;

(2) The hearing must take place before the termination becomes effective;

(3) The affected person must be given notice of the charges against him a reasonable time before the hearing is to take place;

(4) The affected person must be given an opportunity to be heard at a meaningful time and in a meaningful manner, appropriate to the nature of the case.

Should you find that all of these requirements were fulfilled in this case then the plaintiff's right to due process was not violated. However, should you find that all of these requirements were not fulfilled then the plaintiff's right to due process was violated and you should award the plaintiff the amount of damages which you find were proximately caused by this violation.

INSTRUCTION NO. 7

DUE PROCESS CLAIM – LIBERTY INTEREST

As stated before, the Fourteenth Amendment to the Constitution provides that no state shall deprive any person of his liberty without due process of law.

The concept of liberty recognizes two particular interests of a public employee:

(1) The protection of his good name, reputation, honor and integrity; and,

(2) His freedom to take advantage of other employment opportunities.

These are two separate liberty interests, and the manner in which a public employee is terminated may deprive him of one or both of these interests. When the termination is accompanied by public dissemination of the charges against him, and those charges would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may have an opportunity to clear his name. Where the allegations are of a serious nature, such as perjury or unethical conduct, the hearing must meet the minimum requirements of due process, and, additionally, must allow the employee to be accompanied by an attorney and to confront and cross examine his accusers.

In order to prevail upon his civil rights claim against the defendants for a violation of his right not to be deprived of a liberty interest without due process of law, plaintiff must establish by a preponderance of the evidence the following elements:

FIRST: That plaintiff's termination was accompanied by public dissemination of the charges against him;

SECOND: That the reasons for his dismissal would stigmatize his good name, reputation, honor and integrity, or foreclose future employment opportunities; and,

THIRD: That plaintiff was not afforded the opportunity to clear his name at a hearing which met all of the following requirements of due process:

(1) A hearing before an impartial tribunal;

(2) A hearing before the termination becomes effective;

(3) Notice of the charges against him a reasonable time before the hearing is to take place;

(4) An opportunity to be heard at a meaningful time and in a meaningful manner; and

(5) The opportunity to be accompanied by his attorney and to confront and cross examine his accusers.

INSTRUCTION NO. 8

DEFENSE OF GOOD FAITH

You are instructed that the individual defendants in this action have raised the defense of qualified "good faith" immunity by alleging that each defendant acted in good faith in connection with plaintiff's termination from employment. In this regard, you are instructed that a defendant in a civil rights case can establish as a defense to liability for damages under the Civil Rights Act a showing that he acted in good faith.

You are instructed that for an individual defendant to be entitled to good faith immunity for his actions, he must prove by a preponderance of the evidence:

FIRST: That he was acting within the scope of his office and was performing the duties of that office during the times relevant to plaintiff's claims in this lawsuit;

SECOND: That his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

With regard to the second element you are told that if the law at that time was not clearly established, an official could not fairly be said to "know" that the law forbade such conduct. However, if the law was clearly established, the defense of good faith ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading good faith as a defense claims extraordinary circumstances and can prove that he neither knew nor

should have known of the relevant legal standard, then the defense should be sustained.

You are further instructed to keep in mind that a "good faith" defense is available only to the individual defendants and not to the City of Oklahoma City.

* * *

[p. 935] BY MR. NAIFEH:

Q Would you state your name, please.

A Carl Scott Johnson.

Q Mr. Johnson, how are you employed?

A I'm the City Manager of Oklahoma City.

Q How long have you been the City Manager for Oklahoma City?

A Three years.

Q Briefly describe for the jury your past history with the City of Oklahoma City.

A I was hired as Assistant City Manager in late 1976. Served as Assistant City Manager continuously until November of 1981 and was appointed City Manager at that time.

Q As City Manager, would you briefly tell the jury what your duties and responsibilities are?

A I'm the chief administrative officer of the City government, serve at the pleasure of City Council, hired by City Council, can be removed by City Council with or without cause.

As the chief administrative officer, I have responsibility for hiring and firing all employees, for conducting the day-to-day operations of the City government, for recommending policy measures to the City Council, and for carrying out the City Council's policies.

Q I would show you what's been marked as Defendants' [p. 936] Exhibit Number 1 and ask you to look through that and tell me if you can identify that.

A It appears to be portions of the City Charter, Article 3 relating to municipal employees. Contains the portion providing the authority to appoint and remove employees be the duty of the personnel director, and how employees are classified.

Q Does it contain a portion of the charter that relates to the duties of the City Manager?

A Yes, it does, in Section 3 of Article 4.

MR. NAIFEH: Offer this at this time, your Honor.

THE COURT: Let it be received.

Q (by Mr. Naifeh) Mr. Johnson, how is a charter adopted?

A It's adopted by the majority vote of the people.

Q So this charter was adopted by a majority vote of the people of the City of Oklahoma City.

A Yes, that's correct. And any amendment also must be voted on by majority of the people.

Q I hand you what's been marked as City Exhibit Number 12 and ask if you can identify that.

A That's a portion of the City's personnel policies relating to grievances and contains a section establishing a grievance Review Board and procedures for appeal.

Q That's not the Oklahoma City Police Department Disciplinary Review Board, is it?

* * *

EXHIBIT SHEET

No. ___ of ___ Pages

Case No. 84-65-E Style Melton vs. City of OKC
Judge Eubanks C.R. Deputy Miller Reporter Delbeck
Defendants Exhibits

Exhibit Number	Description of Exhibit	Date Adm.	Disposition
1	Okla. City Charter	2/1/85	
2			
3			
4			
5			
6	FOP Agreement	1/30/85	
7			
8			
9	Internal Affairs Report		
10			
11			
12	Personal Policy	2/1/85	
13			
14	Minutes of Grievance Committee	1/30/85	
15	Resume	2/1/85	

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAYMON J. MELTON, Plaintiff – Appellee/ Cross – Appellanti, v. CITY OF OKLAHOMA CITY; GERALD L. EMMETT; MARVIN MAXWELL, Major; WILLIAM R. CHAMBLESS; CARL SMITH; ROBERT TAYLOR; DAVID MCBRIDE, Lieutenant; PAULA HEARN; JOHN DOE; RICHARD ROE, and Other Unidentified Individuals; LLOYD A. GRAMLING, GERALD L. EMMETT; MARVIN MAXWELL; ROBERT TAYLOR; PAULA HEARN, Defendants–Appellants/ Cross–Appellees.	)	No. 85-1738

ORDER

Filed November 21, 1989

Appellant's motion for an extension of time to file a brief on rehearing is granted. Appellants' brief shall be filed on or before November 27, 1989. The order of November 3, 1989, calls for a brief so the rules governing

principle briefs applies. The limitation is 50 pages but the parties are admonished to be succinct.

By operation of Fed. R. App. P. 41(a) issuance of the mandate is stayed pending disposition of the pending petitions for rehearing.

Rehearing was granted by the court en banc.

Entered for the Court

Robert L. Hoecker, Clerk

By /s/ Patrick Fisher
Patrick Fisher,
Chief Deputy Clerk

Supreme Court, U.S.
FILED
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(3)

No. 91-281

In The

Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION FILED BY CITY OF OKLAHOMA CITY

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QUESTIONS PRESENTED

1. The cross petition for writ of certiorari should not be granted inasmuch as the petition fails to raise issues which would justify the court exercising its discretion.

2. The cross petition for writ of certiorari should not be granted inasmuch as the petition raises issues not preserved below.

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A. Gramling, Chief of Police for the City of Oklahoma City; Gerald L. Emmett, Assistant Chief of Police for the City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to the City Manager, Defendants

Oklahoma Municipal League, Inc. amicus curiae[1]

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[1] The corporations noted are public corporations with no known subsidiaries of which petitioner is aware.

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To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION FILED BY CITY OF OKLAHOMA CITY

Respondent herein, Raymon J. Melton[2], respectfully prays that the court deny the cross petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

[2] Petitioner in Case No. 91-29, and respondent in case nos. 91-280, 91-281, 91-304.

OPINIONS BELOW

The en banc opinion of the Tenth Circuit is reported at 928 F.2d 920[3]. This decision was entered after an order granting a hearing en banc on four (4) specific issues. This order is reported at 888 F.2d 724, and is set out at App. 50-52. The panel decision of the Tenth Circuit is reported at 879 F.2d 706 as *Melton v. City of Oklahoma City,* and is set out at App. pp. 53-136.

JURISDICTION

The decision of the Tenth Circuit was entered on March 1991. This court granted . extension to file the instant petition for writ of certiorari until July 2, 1991, on which date the petition was filed. The respondent filed it's cross petition for writ of certiorari on August 5, 1991. The corrected petition was received by the petitioners on August 26, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case involves the provisions of the First and 14th Amendments to the Constitution of the United States. The First Amendment provides:

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[3] A copy of this opinion is included at App. 1 of Petitioner's Appendix to the petition in Case No. 91-29. Hereinafter, reference to the appendix to Case No. 91-29 shall be referred to as App. ___.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 14th Amendment provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions are implemented by 42 U.S.C. Sec. 1983 which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District or Columbia, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

As noted above, the cross-petitioner's application for a writ of certiorari is one of four pending cases. The factual background to this case is clearly set forth in the petition for certiorari filed by Raymon J. Melton in Case

No. 91-29. However, the cross-petitioner makes several erroneous statements of fact which must be addressed.

Apparently, at the heart of the cross-petition is the assertion that Raymon J. Melton had secretly recorded a conversation with a prosecutor while on duty.

As noted in the factual statement in No. 91-29, during the investigation and prosecution of William Page, the prosecutor, a United States Attorney named Wes Fredenburg, decided to interview R.J. Melton as a potential witness. Since Melton's name had come up during court authorized wire taps, Fredenburg considered Melton a "suspicious person". Fredenburg, recognizing the close relationship between Page and Melton wanted to interview Melton as a potential defense witness.

It is important to note that Melton was not involved in any fashion in the investigation of William Page. To the contrary, Melton was specifically excluded from the investigation. Thus, Melton's contact with Page arose simply because of his familiarity with the accused, and the chief witness for the prosecution[4].

In contacting Melton to request an interview, Fredenburg followed an unusual procedure. Fredenburg neither contacted Melton directly, nor sought permission through Melton's supervisor to interview him. Rather, Fredenburg had a personal friend, Maj. Marvin Maxwell, direct the attendance of Melton at the U.S. Attorney's office. This procedure caused Melton substantial concern inasmuch as he felt he had been under surveillance because of his

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[4] Trial transcript pp. 325-328, 700-701.

connection with Page. In addition, rumors were circulating that a police officer would be indicted in connection with the Page case. Therefore, at the suggestion of his immediate supervisor, Melton decided to tape record the meeting with Fredenburg. This tape recording was to insure that he was not misquoted in any matter arising from this meeting[5].

Although the cross petitioners attempt on appeal to place some significance on the act of tape recording, the record at the trial level was clear that this was a common practice among police officers. That is, police officers routinely tape record meetings for their own protection[6]. Moreover, and more important, the defendants in this case each testified that *there was nothing improper in Melton making this tape recording*[7].

At the conclusion of this meeting, Fredenburg informed Melton that because of the information he had, he would most likely be called as a witness for the defense[8].

The information which Melton provided to the prosecution was not provided to the defense. Prior to the trial, the defense contacted Melton as a possible character witness. During the defense's pretrial preparation, they learned, for the first time, that Melton had provided

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[5] See trial transcript pp. 104-113.

[6] Trial transcript p. 113.

[7] See trial transcript pp. 309, 317, 639, 690, 766.

[8] Trial transcript p. 118.

information to the prosecution which was exculpatory in nature, and related directly to the credibility of the prosecution's chief witness. Page's defense obtained a copy of the tape recording and, in conjunction with an affidavit, filed a motion to dismiss for failure to provide this information. This motion to dismiss was denied by the trial court. The basis for the denial was not that the material had not been *Brady* material. Rather, the basis was that the failure to disclose this material was not sufficient misconduct to justify a dismissal of the indictment.

Thereafter, the trial of William Page proceeded. Two police officers testified for the defense: Raymon J. Melton and Don Schimmels. Throughout the trial, the police department had assigned an observer, Major Marvin Maxwell. Immediately upon the verdict being rendered against Page, the cross petitioners began investigations on Melton and Schimmels. Melton was discharged and Schimmels was forced to resign.

At page 5 of the cross-petition it is stated that the interview took place while Melton was acting in the course of his duties as a police officer. This is a mischaracterization. As noted above, Melton had not been involved in any way in the investigation of William Page. This interview with Fredenburg was not part of any assignment he had as an Oklahoma City police officer. Rather, this interview was conducted simply because of his familiarity with the accused and the prosecution's chief witness.

At page 6 of the cross petition, it is repeatedly stated that this interview was "confidential". There is no evidence that either Melton or Fredenburg considered this

conversation "confidential". Rather, the cross petitioner's appear to be continuing to assert an unconstitutional rule that police officers may *never* cooperate with defense counsel[9].

Although cross petitioners now attempt to place great weight upon this tape recording, they did not urge it below. That is, as noted, at trial they admitted there was no reason to assert that tape recording was improper. Further, they neither objected to, nor submitted

---

[9] In this regard, Lloyd Gramling, the chief of police testified:

> Q. Now, is there a rule in the police department prohibiting officers from tape recording individuals?
>
> A. No. No.
>
> Q. Is there a rule that prohibits a police officer from cooperating with defense counsel?
>
> A. With some qualifications.
>
> * * * *
>
> Q. At what point can a police officer, as a private citizen, participate in defense without permission of a prosecutor and without permission of a –
>
> A. Well, never, if it is based upon his – the information he has gained in his official capacity.

Similarly, William Chambless, a member of the disciplinary review board testified that having talked to the prosecutor, the witness was precluded from revealing the substance of that conversation to defense, even for purposes of showing prosecutorial misconduct. Trial transcript p. 851.

instructions about, any assertion that tape recording of the prosecutor was a defense to plaintiff's actions[10].

REASONS FOR DENYING THE WRIT

THE CROSS PETITIONER NEITHER PRESERVED ITS OBJECTIONS TO THE FIRST AMENDMENT CLAIM, NOR CITE ANY BASIS FOR THIS COURT GRANTING CERTIORARI

A. Introduction

Cross Petitioner's first basis for their petition is that the lower courts had failed to properly address the issue of the balancing test under *Connick v. Myers*, 461 U.S. 138 (1983). In this regard, the Tenth Circuit[11] noted that while a governmental entity had an interest in intragovernmental cooperation, such interest did not outweigh the Plaintiff's interest in free speech. Thus, the court reasoned:

> [W]e are unpersuaded that the City's fundamental assumption – that any communication between law enforcement officials is by its very nature confidential – is correct. It is undisputed that neither Mr. Melton nor the City Police

---

[10] With respect to the proceedings set forth by defendant, they make an assertion as to the present status of the verdict that is not accurate. However, the exact status and amount of the verdict presently pending is not of such significance that it need be addressed in detail in the instant opposition.

[11] The Tenth Circuit addressed this issue in their panel decision. This rationale was not affected by the en banc decision.

Department participated in an official capacity in the Page investigation and prosecution; it was solely a federal matter. We view the communication between Mr. Melton and the prosecutor (which in turn was disclosed to Mr. Page's counsel) as one arising outside the scope of departmental confidentiality. The transcript of Mr. Melton's interview with the federal prosecutor clearly shows that the prosecutor interviewed Mr. Melton solely because he believed Mr. Melton would probably testify as a defense witness in the Page trial. Furthermore, while we are persuaded that at least some of the information which Mr. Melton possessed initially had been gained in the course of his official duties, the City did not focus on that fact in its confidentiality claim.

Under these circumstances, Mr. Melton's interest in this speech outweighs the City's interest in intradepartmental relations. He is under a high duty as a citizen to come forward with information relevant to a federal investigation and prosecution. In addition, Mr. Melton believed that the information he communicated to defense counsel was actual *Brady* material that he was under a duty to supply. Mr. Melton also indicated that he feared if he did not disclose this information, he would be implicated in Mr. Page's activity and possibly suffer prosecution as a result. As with his trial testimony, he believed he was disclosing exculpatory material at the request of defense counsel in a public investigation – information which the federal prosecutor did not otherwise disclose.

(App. pp. 67-68)

B. Issue Not Preserved Below

It must be highlighted that cross petitioner's assertion of a fundamental error below has not been adequately preserved. That is, prior to the trial of this matter, cross petitioner's never raised the assertion that either the tape recording was a basis for defeating Plaintiff's First Amendment claims nor that the Plaintiff's activity were not matters protected by the First Amendment[12]. That is, prior to trial, they did not *specifically* raise the issue by motion or answer. In the pretrial order, they merely asserted that "Plaintiff's termination was not based on the exercise of his constitutional rights". At trial, cross petitioners merely objected as follows:

---

[12] It must be noted that the district court did instruct the jury as to "confidentiality". Thus, the district court informed the jury as follows:

> Thus, the question of whether or not it was proper to let Judge Page's lawyers have the recorded conversation depends upon your determination of whether the information was confidential in nature or was confided to him in his official capacity. If you so find, then it was improper for plaintiff to give same to Judge Page's lawyers, and plaintiff could legally be fired to keep it secret, unless revelation of such information was necessary in the performance of his duties.
>
> On the other hand, if you find that the information was neither confidential in nature nor confided to him in his official capacity, or that revelation of the information was necessary in the performance of his duties, then the plaintiff could not be fired for failing to keep it secret.

(Continued on following page)

> Going to Instruction Number 5, Defendants, as a matter of law, object to the instruction. It fails to instruct regarding the balance test requirement under the Connic (phonetic) case. It fails to take into consideration the nature of public employment and a public employee's right to free speech.
>
> We feel that the arguments of the duty of every citizen to participate in the participation of – every citizen is an improper instruction and contrary to law and fails to take into consideration the nature of public employment.[13]

On appeal, the defendants merely asserted that the trial court had improperly instructed the jury with respect to the "balancing test".

The undersigned would urge that the cross petitioners are attempting to raise issues of law which they did not raise below. Rather, the Court of Appeals, as part of its responsibility to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression", succinctly addressed this issue.

(Continued from previous page)

Thus, cross petitioners, in urging the confidential nature of the disclosure are simply attempting to urge this court to determine, as a matter or law, that the information was confidential. The undersigned would submit that this is a question of fact which was decided by the jury.

[13] Trial Transcript pp. 1002-1004.

The undersigned would urge the court to deny the petition for certiorari on the basis that cross petitioner did not adequately preserve this below.

C. Balancing Test

In the event the court determines the cross petitioners did adequately preserve this issue, the undersigned would submit that they nonetheless do not assert any basis for granting the extraordinary writ. That is, cross petitioners assert that the decision below was contrary to the decisions of this court and other circuits in (a) determining that plaintiff Melton's activity was a "matter of public concern" and (b) determining that the employer's interest in intradepartmental cooperation was outweighed by the plaintiff's interest in free speech.

With respect to the former issue, the protected nature of the speech, cross petitioners appear to assert that it was not protected based upon a remark in the en banc decision, that the tape recording was for "personal" reasons. As noted above, the cross petitioners admitted at trial that there was nothing improper about tape recording. Rather, the issue concerns the disclosure to defense counsel. In this regard, the Tenth Circuit concluded that the disclosure of this information to defense counsel, and acting as a witness on this matter, was a matter of public concern protected by the First Amendment. While cross petitioners cite numerous cases reflecting the power of the public employer to restrict certain free speech activity, they do not cite a single case which suggests that truthfully disclosing material to the defense during a criminal

proceeding is unprotected activity[14]. Thus, cross petitioners fail to set forth any basis for this court granting certiorari.

THE CROSS PETITION DOES NOT STATE A BASIS FOR CERTIORARI WITH RESPECT TO THE EMPLOYER'S BURDEN OF SHOWING INTERFERENCE

Cross petitioner's next argument is that the Tenth Circuit improperly shifted the burden of demonstrating interference with the operation of government onto the defendant City.

In *Rankin v. McPhearson*, ___ U.S. ___, 107 S.Ct. 2891, 2899 (1987) this court, in addressing the factual matters which must be demonstrated noted that the "[employer]

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[14] Indeed, as the Tenth Circuit noted at App. p. 62 this disclosure was certainly akin to protected whistle blowing activity, stating:

> Mr. Page was a public official under investigation and prosecution for malfeasance in his public duties. Of course, the public would want, and is arguably entitled to, information relating to a public official's guilt or innocence in a public trial which relates to his public duties. Additionally, Mr. Melton's speech was "calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of government officials in the conduct of their official duties", by revealing what he believed to be exculpatory Brady material to Mr. Page's defense counsel and the court – information which might otherwise have been suppressed by the federal prosecutor. [footnotes and citations omitted].

fails to demonstrate a state interest that outweighs McPhearson's First Amendment right".

While the Tenth Circuit did note that some circuits allowed a reasonable belief that disruption will occur as sufficient to meet the public employer's burden, the panel was careful to note that "None, however, accept purely speculative allegations. Here, the City made no showing of disruption or, for that matter, potential disruption; only a bald assertion that Mr. Melton's actions in communicating with Page's counsel implicated the City's confidentiality interests" (App. p. 67).

THE CROSS PETITIONER NEITHER PRESERVED ITS OBJECTIONS TO THE PROPERTY INTEREST CLAIM NOR CITE ANY BASIS FOR THIS COURT GRANTING CERTIORARI

A. Failure to Preserve

Cross petitioners assert that the determination of a property interest in continued employment was contrary to decisions of this court. However, as the Tenth Circuit noted, the "property interest" claim to a retirement benefit was not preserved below[15]. That is, cross petitioners

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[15] At footnote 18, the Tenth Circuit noted:

> The City did not challenge the trial court's finding that Mr. Melton had a property interest in his status as a retired police officer. We do not disturb that finding on appeal.

neither asserted at trial, nor took any appeal, from the district court's determination that Melton had a property interest in his status as a retired police office. The undersigned would submit, therefore, the court should deny the cross petition for certiorari.

B. Alleged Conflict

Cross petitioner's assertion of a conflict with the decisions of this court is unsupported. That is, they can point to no law or case authority which supports their assertion that an individual does not enjoy a property right in the emoluments of his retirement status.

Indeed, cross petitioners cite as their authority *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The suggestion appears to be that the evidence did not show that the Plaintiff was entitled to his retirement status[16]. The undersigned would simply submit that *Roth*, specifically recognized that it was sufficient if the individual had a legitimate claim to entitlement. The court need not determine whether he was, in fact, entitled to the benefit. Thus, as explained in *Roth*:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent

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[16] Contrary to this assertion, the undersigned would submit that the evidence showed that Raymon J. Melton was the *only* police officer ever denied the right to wear his uniform and carry his badge. This denial prevented him from obtaining outside employment as a security guard.

> source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly*, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

In this case, the statute cited provides Raymon Melton with a claim of entitlement. The due process hearing was to allow him to attempt to establish his right. As the Tenth Circuit noted, that is exactly what cross petitioner failed to allow.

Accordingly, the undersigned would submit that the cross petitioner has failed to state a basis upon which a writ of certiorari should be granted.

THE CROSS PETITIONER FAILS TO STATE A BASIS FOR CERTIORARI ON THE ISSUE OF THE PROPERTY CLAIM

As a final argument, the cross petitioners urge a right to petition on the issue of a property right in continued employment. Inasmuch as there is no authority or argument in support of such an assertion, it should be denied.

CONCLUSION

Based on the foregoing, the undersigned would respectfully submit that the cross petition for certiorari in this case should be denied.

Respectfully submitted,

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Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The cross-petitioner, The City of Oklahoma City, respectfully submits this reply in response to new matters raised by respondent, Raymon J. Melton in the statement of the case as well as to matters raised in the respondent's reasons for denying the writ.

NEW MATTERS ADDRESSED IN STATEMENT OF THE CASE

In the Statement of the Case, respondent claims cross-petitioner made certain erroneous statements in the following areas:

(1) The respondent objected to The City's assertion that Raymon J. Melton had

"secretly recorded a conversation with a prosecutor while on duty" and while in the course of Melton's duties as a police officer. (Brief in Opposition at 4, 5, and 6.) In suggesting this as error, respondent noted he was not involved in any way with the prosecution of District Judge William Page, and in fact, was a chief witness for the criminal defense.

(2) Respondent suggests cross-petitioner placed too much significance on the "act of tape recording", when, in fact, defendants in the trial had testified there was nothing improper in making this tape recording. (Brief in Opposition at 5 and 6.)

(3) The respondent claims error when cross-petitioner describes the conversation between Lt. Melton and Assistant U.S. Attorney Wes Fredenburg as "confidential". (Brief in Opposition at 6, 7 and 8.)

A. Melton on Duty When Interviewed

Although there is much discussion both from the respondent and the Court of Appeals for the Tenth Circuit concerning Melton's status at the time of the interview, the evidence submitted and the testimony of respondent clearly show that respondent was "on duty" at the time he secretly taped his interview with Mr. Fredenburg.

Melton testified at the trial:

Q. Then did you proceed to the office of Mr. Fredenburg in the due course of events?

A. I did, on Friday. I don't recall the exact date. It was in May.

Q. Around May 12, 1983?

A. That sounds about right.

Q. And at this time, how did you prepare yourself?

A. I was on duty. Mr. Fredenburg had advised me to be in his office between 3:00 and 3:30 on Friday, that he wanted to talk to me. And I advised him that I would be on duty. He said, that's fine, just come on by and he'd talk to you. I said okay.

I was in uniform. I did have a walkie-talkie, and I was on duty. And my captain knew where I was going to be. (Tr. Vol. 1, 110, 111)

Melton also admitted he was "on duty" in his prefatory comments made in his tape recording. (Tr. Vol. I at 182)

Judge McKay, in announcing the opinion of the panel (Petitioner's Appendix at 55.), opined:

> At least some of the information discussed with the federal prosecutor during the interview was gained in the course of Mr. Melton's duties as a police officer.

Although Judge Page had been indicted on a federal charge and the investigation on that charge was conducted by federal law enforcement, the information Melton had provided Assistant U.S. Attorney Fredenburg in the interview would not have been accessible to him had he not been a police officer.

B. Significance of tape recording by Melton and the view of confidentiality by the Police Department.

The Departmental (Disciplinary) Review Board of the Police Department and former Police Chief Lloyd Gramling determined that Melton's action in surreptitiously recording a private conversation with a federal prosecutor and turning over the recorded tape to Page's defense

counsel was in violation of Section 1.01, of the Oklahoma City Police Code of Ethics, which requires every police officer to keep secret whatever that officer hears or sees of a "confidential nature" unless the "revelation is necessary in the performance of my duty."

The findings of the Board had been submitted to Police Chief Gramling, who subsequently terminated Melton after a disciplinary dismissal had been approved by the City Manager. A portion of the text of Chief Gramling's September 13, 1983 letter to Melton provided:

> In this instance, you had a private meeting with a representative of the U.S. Attorney's Office about the upcoming trial of Judge Page and without the knowledge of the U.S. Attorney, you recorded that conversation. You then furnished this recorded conversation to the defense council (sic) which was used in defending Judge Page on the criminal charges.
>
> The Board feels you were in flagrant violation of our Police Code of Ethics and recommended you be terminated from your employment with this Department. (Plaintiff's Exhibit 54, R. 0143.)

The Departmental (Disciplinary) Review Board, sitting in its adjudicative capacity, found a violation of the Code of Ethics. This finding was explained by Major Marvin Maxwell in his deposition testimony:

> Q. Why did you vote in the fashion that you voted?
>
> A. Well, there's several reasons. I felt that it was sustained that Lt. Melton did violate our Code of Ethics, our code of conduct that he – Lt. Melton, as I say, he had 20, almost 21 years on the police department. He wasn't a rookie officer.
>
> His whole life has been police work. He knows the police department. He knows the

philosophy of the police department. He knows how we act. He –

Q. In that regard, is it improper for Mr. Melton to testify on behalf of the defendant in a criminal trial?

A. No, sir, it is not.

Q. Would that be a violation of his Code of Ethics?

A. No, sir, it would not. (Tr. Vol. IV at 787, lines 12-25)

Q. Improper for Mr. Melton to tell defense counsel the facts that he knows about a case about a pending lawsuit?

A. No, sir.

Q. Would that have been a violation of his Code of Ethics?

A. No, sir.

Q. What in this case was a violation against the police Code of Ethics?

A. I'm sorry.

Q. What did Mr. Melton do that violated the Code of Ethics?

A. He violated a *confidential relationship*, a *confidential conversation* he had with a prosecuting attorney about a criminal case which he was not the investigator in, we all agree, but however it still was a criminal case.

And he was – this discussion was being held as a result of him being a police officer with a prosecutor even though he was not the investigator on the case.

He then *secretly recorded* this *confidential conversation* and gave this information to defense counsel. This type conduct, our credibility, the police department's credibility is established by the relationships we have of the people we work

with, the trust that we have and the people that we work with, the trust that other police agencies have that we will not violate a confidence. The relationship we have with all law enforcement agents in the community, that we do not violate confidences. (Emphasis supplied, Tr. Vol. IV at 788, lines 1-25)

What Melton did, undermined the integrity, the whole integrity of the Oklahoma City Police Department. And that's the reason I voted to fire him.

Q. Was it a violation of that trust if you tell defense counsel only those things that you know?

Let's put it in terms of this case. Is it a violation of confidence between a prosecutor and a police officer for that police officer to tell defense counsel that he knows the defendant?

A. No, sir.

Q. Is it a violation of that trust for him to tell defense counsel that he knows a prosecution witness?

A. No.

Q. Is it a violation of that trust for him to give his opinion as to the truth and veracity of that prosecution witness?

A. No, sir.

Q. In this case was it a violation of the trust between he and the prosecutor for him to tell defense counsel that Richard Riley had told me that he was going to be paying Judge Page's attorneys fees for a long time?

A. No, sir.

Q. That didn't violate the trust.

A. No, sir.

Q. So you didn't fire him for that. (Tr. Vol. IV at 789, lines 1-25)

A. No, sir.

Q. Would it be against his Code of Ethics for a police officer to tell someone that a prosecutor was in violation of the law?

A. Absolutely not.

Q. Would he be required to –

A. He would be required and compelled to do that, any violation of the law.

Q. Could Mr. Melton have done that without revealing his entire conversation or providing the tape?

A. Of course.

Q. Would you have voted to terminate Mr. Melton if it violated his First Amendment rights to terminate him?

A. I'm sorry, sir, I didn't hear you.

Q. Would you have voted to terminate Mr. Melton if it had violated Mr. Melton's First Amendment rights to terminate him: [sic]

A. Of course not. (Tr. Vol. IV at 790, lines 1-17.)

The City of Oklahoma City's representation that the covert recording of a private conversation as "confidential" was based upon the adjudicative findings of the Board in applying § 1.01 of the Police Code of Ethics.[1]

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[1] The Tenth Circuit panel distinguished between a confidential relationship in the intradepartmental structure and one in the interdepartmental setting in its First Amendment analysis. Cross-petitioner does not agree with this distinction. (Petitioner's Appendix at 66, 67 and 68)

RESPONSE TO REASONS FOR DENYING THE WRIT AS TO NEW MATTER.

Cross-Petitioner Properly Preserved Issue as to First Amendment.

Respondent asserts that prior to the trial " . . . cross-petitioner's [sic] never raised the assertion that either the tape recording was a basis for defeating Plaintiff's First Amendment claims nor that plaintiff's activity were not matters protected by the First Amendment." Further, respondent claims The City merely objected to Instruction No. 5 based upon the balancing test, which he asserts does not properly preserve the First Amendment issue for certiorari. (Brief in Opposition at 10 and 11.)

Counsel for respondent further alleges the jury made a finding that the tape recording was not of a confidential nature and that issue is a question of fact, not law. (Note 12.)

As recited in the Brief in Opposition, The City generally stated among its pretrial order: "Plaintiff's termination was not based on the exercise of his constitutional rights." In response to petitioner's assertions, cross-petitioner contends that the above quoted statement from the pretrial order is adequate to preserve the issue as to any of the amendments to the U.S. Constitution, including the First and Fourteenth. Additionally, The City's counsel cited *Connick* in his objection to Instruction No. 5 which preserves this issue for appeal (Tr. Vol. V at 1002 and 1003.) Furthermore, the Court of Appeals for the Tenth Circuit reviewed errors of law as to Instruction No. 5 (First Amendment Claims of Plaintiff). The Tenth Circuit held that the issue of whether Mr. Melton's speech was constitutionally protected was one of law, not fact, citing *Connick v. Myers*, 461 U.S. 138, 148 (1983). The Tenth

Circuit further determined that this instruction was erroneous, but held it to be harmless.

As part of the analysis of the implication of the First Amendment in a public employment setting, a multi-step process is invoked. The discussion of this analysis is contained in The City's cross-petition for certiorari. (Cross-Petition at 11-23.) The "balancing test" is only one step of the analysis, but the entire process must be reviewed when determining whether a public employee's First Amendment rights have been violated.[2]

The respondent also contends cross-petitioner did not introduce any evidence of actual disruption or potential disruption in the workplace.

The respondent, however, offered the testimony of its expert, Dr. George Kirkham, who stated:

> Q. You don't think there would be any adverse effect of a prosecutor being recorded and his conversation with a police officer being turned over to a third party in the relationship between that prosecutor and the police department?
>
> A. I don't know that I can answer that question. I suppose if a prosecutor learned that a police officer was surreptitiously and without good reason taping his conversation, and, again, without good reason turning it over to defense counsel, yes, there would be very serious consequences. (Tr. Vol. II at 477, lines 16-25)

It appears that Dr. Kirkham recognizes the potential impact of Mr. Melton's actions on the relationship

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[2] Cross-petitioner wishes to correct a typographical error on page 13, paragraph 3 of its Cross-Petition with the inclusion of the word "not" before "the motivating factor."

between the police department and the federal prosecutor.

CONCLUSION

Cross-petitioner contends the questions presented in its cross-petition for writ of certiorari have been preserved and the new matters raised by respondent do not constitute a basis for denying this cross-petition.

Respectfully submitted,

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